

STATEMENT OF THE CASE

ISSUES

Respondent argues that claimant did not sustain his burden of proof that he suffered personal injury by an accident that arose out of and in the course of his employment. Specifically, respondent contends that no term or condition of employment caused or contributed to claimant's initial accident and that the accident was caused by a neutral risk. Further, respondent asserts that the ALJ erred in awarding benefits despite a factual finding that claimant's disability was caused by his overdose of medication, arguing that K.S.A. 2006 Supp. 44-501(d)(2) states that a respondent is not liable where an employee's injury, disability or death was contributed to by the employee's use or consumption of alcohol or drugs, including medication.

Claimant contends that his initial injury resulted from his working in an upside down position, causing him to fall and hit his head. Claimant further contends that his overdose of prescription medication was caused by a miscommunication regarding the proper dosage and was accidental. Claimant requests that the Board adopt Dr. Daniel Zimmerman's 70 percent permanent impairment rating but that the ALJ's Award otherwise be affirmed.

The issues for the Board's review are:

(1) Did claimant sustain his burden of proving that he suffered personal injury by an accident that arose out of and in the course of his employment with respondent?

(2) Was claimant's injury to his right lower extremity a natural consequence of his original injury of November 14, 2006?

(3) Did the ALJ err in allowing compensation because claimant's disability was due to his consumption of an overdose of medication?

(4) What is the nature and extent of claimant's disability?

FINDINGS OF FACT

Claimant was employed by respondent as a radio repair mechanic. On November 14, 2006, claimant had been leaning over working on the heater core of a Humvee. He reached out and grabbed hold of the rearview mirror frame to pull himself up. The next thing he knew, a coworker was yelling at him to wake up. He had fallen and suffered a concussion. Respondent sent him to Dr. Kumar, who prescribed medication for headaches. A couple of weeks after the incident at work, claimant took an overdose of his prescribed medication and woke up two or three days later. When he woke up, he had difficulty moving his right leg and had numbness over the dorsum of his right foot. Claimant testified that his overdose of medication was accidental, as he took the amount of medication he was told to take by Dr. Kumar.

Dr. Steven Hendler, who is board certified in physical medicine and rehabilitation, treated claimant at the request of respondent. He first saw claimant on April 11, 2007. Claimant complained of aching and burning on the top of his right foot and severe pain on the bottom of his right foot. He described to Dr. Hendler the incident regarding the overdose of pain medication that caused him to sleep for two days without waking up and then having significant problems. Claimant did not tell Dr. Hendler anything about how he ended up with a concussion at work. Dr. Hendler's notes indicate only that claimant had a fall at work with subsequent dizziness and nausea.

Dr. Hendler took a medical and social history from claimant, reviewed the medications he was on, and performed a physical examination. He sent claimant to have a diagnostic tibial nerve block. After claimant had the nerve block, he reported a total relief of his pain. Because of that result, Dr. Hendler diagnosed claimant with tibial neuropathy and ruled out complex regional pain syndrome. Dr. Hendler testified that he did not find any of the diagnostic criteria for complex regional pain syndrome in regard to claimant. He started claimant on medication to try to better manage the pain. Dr. Hendler testified that claimant's foot problems were limited to his foot, including the ankle.

Dr. Hendler said that claimant's nerve injury was a complication of the medication that claimant was prescribed. The medication was used to treat headaches that had been attributed to an event that occurred on November 14, 2006. Therefore, he opined that claimant's tibial neuropathy would be related to the fall.

Dr. Hendler referred claimant to a surgeon, Dr. Greg Horton, to evaluate options for treating his nerve problems. A nerve stimulator was implanted into claimant's affected area. Dr. Horton's report of December 15, 2007, was stipulated into the record. Dr. Horton rated claimant as having a 30 percent permanent partial impairment to the right lower extremity secondary to his occupational injury of November 14, 2007.

The only restriction Dr. Hendler imposed on claimant was that he needed to work in an area that was free of excess electromagnetic field activity because of his stimulator. He did not give claimant an impairment rating. He continues to treat claimant and has prescribed medication to manage his pain.

Dr. Daniel Zimmerman, a board certified independent medical examiner, examined claimant on May 28, 2008, at the request of his attorney. Claimant gave him a history that on November 14, 2006, he fainted on the job and hit his head and right shoulder. Claimant told him the fainting was related to his work. Dr. Zimmerman said that there is no other explanation in claimant's medical records to explain his passing out other than that he stood up too quickly after being underneath a car. Claimant's right foot problem was caused when he took an excess dose of Amitriptyline for pain and slept for 48 hours without moving,

which caused him to develop tissue damage because of lack of motion and inadequate blood supply.¹

Dr. Zimmerman opined that claimant suffers from complex regional pain syndrome. Although Claimant did not have eight or more findings for complex regional pain syndrome, he had been treated for it with the nerve stimulator and had improvement. Dr. Zimmerman relied on the records of other physicians to know what claimant's condition was before he saw him. He doubted if the records of any physician set out eight or more findings for complex regional pain syndrome and did not recall if any physician specifically stated that claimant did not have the syndrome.

Dr. Zimmerman rated claimant as having a 70 percent permanent partial impairment of the right lower extremity at the mid thigh level. He referred to page 3/89, Section 3.21 of the *AMA Guides*,² which referred to causalgia and reflex sympathetic dystrophy in the lower extremity. Dr. Zimmerman stated that there is no good way to rate claimant's pain complaint, so he based his rating on page 3/56 where it indicates that major causalgia can result in complete loss of function and an impairment rating of the extremity as great as 100 percent. He opined that claimant had severe residuals in the lower extremity that were not represented by a rating of 30 percent to the lower extremity. He chose 70 percent because he did not think claimant had 100 percent disability.

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.³ Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.⁴

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment.

¹ Dr. Zimmerman's report indicates that claimant was given a prescription for Amitriptyline to be utilized at a dose of 10 mg. daily and increased by 10 mg. increments every three days, and that claimant had instead taken 50 mg.

² American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

³ K.S.A. 2006 Supp. 44-501(a).

⁴ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.⁵

K.S.A. 2006 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2006 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The majority of jurisdictions compensate workers who are injured in unexplained falls upon the basis that an unexplained fall is a neutral risk and would not have otherwise occurred at work if claimant had not been working.⁶ In *Hensley*,⁷ the Kansas Supreme Court adopted a similar risk analysis. It categorized risks into three categories: (1) those distinctly associated with the job; (2) risks which are personal to the workman; and (3) neutral risks which have no particular employment or personal character.

When a primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from that injury, including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.⁸ However, where the worsening or a new injury would have occurred absent the primary injury or where it is shown to have been produced by an independent intervening cause, it is not compensable.⁹

⁵ *Id.* at 278.

⁶ 1 *Larson's Workers Compensation Law*, § 7.04[1] (2006).

⁷ *Hensley v. Carl Graham Glass*, 226 Kan. 256, 597 P.2d 641 (1979).

⁸ *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

⁹ *Nance v. Harvey County*, 263 Kan. 542, 952 P.2d 411 (1997).

K.S.A. 44-501(d)(2) states in part:

The employer shall not be liable under the workers compensation act where the injury, disability or death was contributed to by the employee's use or consumption of alcohol or any drugs, chemicals or any other compounds or substances, including but not limited to, any drugs or medications which are available to the public without a prescription from a health care provider, prescription drugs or medications, any form or type of narcotic drugs, marijuana, stimulants, depressants or hallucinogens. In the case of drugs or medications which are available to the public without a prescription from a health care provider and prescription drugs or medications, compensation shall not be denied if the employee can show that such drugs or medications were being taken or used in therapeutic doses and there have been no prior incidences of the employee's impairment on the job as the result of the use of such drugs or medications within the previous 24 months.

ANALYSIS

The Board finds that the original accident that occurred on November 14, 2006, arose out of and in the course of claimant's employment with respondent. Claimant was at work and performing his job when the accident happened. It was not the result of a personal risk or even a neutral risk. Instead, it was the result of rising from an awkward and upside-down position that he had been working in and therefore was a risk associated with the job.

Claimant's right lower extremity injury is likewise compensable because it occurred as a direct consequence of his original head injury. His accidental overdose from the pain medication he was prescribed for his original injury does not preclude claimant from being compensated for the resulting right foot and ankle injury. The overdose was accidental. Claimant believed that he was taking the medication in therapeutic doses, and there were no prior incidences of claimant having been impaired on the job as a result of using such drugs or medications.

The Board agrees with the ALJ that claimant has not proven he suffers from complex regional pain syndrome and, therefore, adopts the 30 percent permanent impairment rating of Dr. Horton as the most credible.

CONCLUSION

(1) Claimant met his burden of proving that he suffered personal injury by accident arising out of and in the course of his employment with respondent.

(2) Claimant's right leg injury occurred as a natural consequence of his original accidental injury.

(3) Claimant's accidental overdose of prescription medication does not preclude compensation.

(4) Claimant is entitled to an award based upon a 30 percent scheduled injury to the lower leg.

The Board notes that the ALJ did not award claimant's counsel a fee for his services. The record does not contain a fee agreement between claimant and his attorney. K.S.A. 44-536(b) requires that the Director review such fee agreements and approve such contract and fees in accordance with that statute. Should claimant's counsel desire a fee be approved in this matter, he must submit his contract with claimant to the ALJ for approval.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award and Nunc Pro Tunc Award of Administrative Law Judge Rebecca A. Sanders dated September 26, 2008, are affirmed.

IT IS SO ORDERED.

Dated this _____ day of January, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
John David Jurcyk, Attorney for Respondent and its Insurance Carrier
Rebecca A. Sanders, Administrative Law Judge